ARTICLE VII – VESTED RIGHTS & NONCONFORMING USES

ARTICLE VII – VESTED RIGHTS & NONCONFORMING USES

DIVISION 1 NONCONFORMING USES

35-701 Purpose

The purpose of this section is to protect the rights of property owners who have lawfully established, and continuously maintained in a lawful manner, a use prior to the adoption of this chapter or prior to any amendment to this chapter which would otherwise render such use unlawful. A nonconforming use or structure that was recognized prior to the adoption of this chapter shall continue to operate under the provision of law under which the nonconforming structure or use was recognized so long as the nonconforming use or structure is not in violation of such provision of law, the adoption of this chapter notwithstanding.

35-702 Continuing Lawful Use of Property and Structures

(a) Nonconforming Use Defined

A nonconforming use shall be any use which:

(1) On the effective date of the ordinance from which this chapter is derived was lawfully operated as a nonconforming use in accordance with the provisions of any prior zoning ordinances; or

(2) On or after effective date of the ordinance from which this chapter is derived was lawfully operated in accordance with the provisions of said ordinance but which use, by reason of amendment to said ordinance, or other governmental action, is not a permitted use in the district in which the use is located; provided, however, that a permitted use, otherwise in accordance with the provisions of this chapter, shall not be deemed a nonconforming use for a failure to comply with the provisions of this chapter relating to permitted signs, yard requirements, off-street parking requirements, or off-street loading requirements.

Territory annexed into the city may continue as provided in subsections (a) and (b) of Texas Local Gov't Code § 43.002, except as provided in subsection (c) thereto.

(b) Limitations on Nonconforming Uses

(1) Nonconforming Uses.

The lawful use of land existing as of the effective date of this chapter, or a lawful use which becomes nonconforming because of an amendment to this chapter, may be continued as provided in this section.

(2) Abandonment.

If such nonconforming use is discontinued for twelve (12) months, any future use of such premises shall be in conformity with the provisions of this chapter.

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Abandonment of a nonconforming use shall terminate the right to operate such use.

(3) Continuance.

The lawful use of any building existing as of the effective date of this chapter may be continued, although such use does not conform to the provisions of this chapter. Such use may be extended throughout the building, provided no structural alterations or additions to the structure, except those required by law or ordinance, are made thereto.

(4) Enlargement.

A conforming structure in which a nonconforming use is operated shall not be enlarged or extended except as required by law or ordinance.

(5) Conditions.

The right of nonconforming uses to continue shall be subject to such regulations as to the maintenance of the premises and conditions of operation as may, in the judgment of the zoning city, be reasonably required for the protection of adjacent property.

(c) Nonconforming Lots of Record

A substandard lot may be used for any used permitted in the applicable zoning district. A "substandard lot" means any lot which fails to meet the requirements for area or width, or both, generally applicable in the district because of a change in the applicable zoning district regulations, annexation, condemnation of a portion of the lot, or other governmental action. The provisions of this section do not require the replatting or combination of platted lots under common ownership which are protected by state vested rights law.

35-703 Newly Annexed Territory

Nonconforming rights may be granted to newly annexed areas in accordance with the following provisions and upon payment of the fees specified in Appendix "C". All applications for nonconforming rights must be filed within sixty (60) days of the effective date of annexation.

(a) Incomplete Construction

Construction may be completed on any structure legally under construction upon annexation provided:

(1) The owner or his designated representative applies to the director of development services for a permit to authorize further work on the structure stating the proposed use of the structure and attaching thereto the plans and specifications relating to the construction; and

(2) The construction is completed within two (2) years of the effective date of annexation.

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Action on the permits shall be taken by the director of development services within fifteen (15) days from the date of application. The director shall deny the permit if he finds that the construction will not meet the requirements of the building, fire protection, or minimum housing codes and other applicable ordinances and codes of the city. If the permit is refused, the construction work shall cease until necessary corrections are made.

(b) Proposed Construction

Proposed construction may be completed upon a finding by the zoning commission that sufficient evidence exists that planning for the proposed use was in progress prior to annexation, as prescribed by Appendix B to this chapter. Within fifteen (15) days from the date of such filing, the director shall present the evidence to the zoning commission for their determination, unless the applicant agrees to a longer period. The applicant shall have twelve (12) months from the date of the zoning commission's favorable determination to secure all building permits. After that time, the nonconforming rights shall expire.

(c) Master Development Plans

Newly annexed areas may be entitled to nonconforming rights for a master development plan upon favorable consideration by the zoning commission. The property owner must submit an application as prescribed by Appendix “B” of this chapter.The zoning commission shall conduct a public hearing on the nonconforming rights master development plan after giving notice to the owners of property within two hundred (200) feet in the manner provided in section 35-403 for a rezoning. The purpose of the public hearing shall be to ascertain (1) the extent to which development of the master development plan had progressed prior to annexation and (2) the extent to which the master plan complies with the policies and objectives of the city's Land Use Plan. If the zoning commission approves the master development plan, construction in conformance with the plan must begin within one (1) year, with all portions of the plan either completed or under construction within five (5) years from the date of annexation. After that time, the nonconforming rights shall expire.

(Ord. No. 98697 § 4 & 6, Ord. No. 100126)

35-704 Change of Use Regulations

(a) To a Conforming Use

Any nonconforming use may be changed to a use conforming with the regulations herein established for the district in which the nonconforming use is located; provided, however, that a nonconforming use so changed shall not thereafter be changed back to a nonconforming use.

(b) To Another Nonconforming Use

The following, and no other, nonconforming uses may be changed to another nonconforming use as herein set forth; provided, however, that a nonconforming use changed to another nonconforming use, as provided, shall not thereafter be changed back to the former nonconforming use:

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Use permitted in:	Located in:	May be changed to use permitted in:
Resource Protection "RP" Residential Estate "RE"	Less restricted residential	Any more restricted district
Any business or industrial	Any residential district	Any residential use or a more restrictive business use as follows: "I-1" use may be changed to any "C-3", "C-2", "C-1", Office, or "NC"; "C-3" use may be changed to any "C-2", "C-1", Office, or "NC"; "C-2" may be changed to, "C-1", Office, or "NC"; "C-1" may be changed to Office, or "NC"; and office may be changed to an "NC" use
Any business district	More restricted business district	A more restrictive business use as follows: "I-1" use may be changed to any "C-3", "C-2", "C-1", Office, or "NC"; "C-3" use may be changed to any "C-2", "C-1", Office, or "NC"
"I-1" district	More restricted business district	"I-1" district

(c) Limitations on Changing Nonconforming Uses

All changes of nonconforming uses hereunder shall be limited by and shall be in accordance with the regulations herein established for accessory uses, home occupations, permitted structures, permitted signs, off-street parking requirements and off-street loading requirements. No nonconforming use shall be changed to another nonconforming use which requires more off-street parking and loading space than the former nonconforming use unless additional adequate off-street and loading space is provided for the increment of the new nonconforming use as would be herein required if the increment were a separate use. No nonconforming use shall be changed to another nonconforming use unless the original nonconforming use was registered in conformance with Section 35-705, below.

35-705 Certificate of Nonconforming Use

For purposes of this section, "applicable regulations" means the provisions of this chapter, or amendments to this chapter, which render a use nonconforming.

(a) Applicability

The owner of a nonconforming use or structure may register such nonconforming use or structure by filing with the department of development services a registration statement.

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(b) Contents

(1) Generally.

Such registration may be made on behalf of the owner by any person, firm, corporation or other entity which has a legal or equitable interest in the nonconforming use or structure. Registration statements shall require a disclosure of the complete ownership of the land and/or structure and shall be in such form and require the furnishing of such information and representation as are needed to show the following:

A. That the use was lawfully established prior to the effective date of the applicable regulations.

B. That the use has been continuously maintained since it was established.

C. That the use has not been abandoned.

(2) Denial of Registration.

The director of development services may deny any registration if it appears that the documents relied thereon are not valid, or that the documents produced to not show the existence of a prior nonconforming use in accordance with the criteria set forth in Subsection (1), above. The applicant may appeal this determination to the city in accordance with § 35-481 of this chapter.

(3) Amendment.

At any time after registration, upon application to the department of development services and with the written consent of the owner affected thereby, a registration statement may be amended to indicate changes in ownership. A copy of each registration statement shall be returned to the owner and a copy filed among the records of the department. The department of development services shall accept and file all tendered registration statements within the permitted time period, but the acceptance of such statements shall not constitute an authorization to operate an unlawful use. The filing of a false registration statement with the department shall constitute a violation of this chapter.

(c) Time Period for Registering

The owner of a use or structure which is rendered nonconforming as a result of the adoption of this chapter shall have three years from the effective date of this chapter to register such use or structure. The owner of a use or structure which is rendered nonconforming as a result of a city-initiated rezoning project or in newly annexed territory, subsequent to the adoption of this chapter is permitted one (1) year after the effective date of the rezoning to register such use or structure. Provided, however, that after the time periods prescribed above nonconforming rights may be established only upon submission, by the owner of sufficient evidence for the director of development services to find that the use or structure existed prior to the date of rezoning and was in legal compliance with all applicable laws.

(d) When Registration Not Required

It is not required to register a use or structure that is made nonconforming by any governmental action other than annexation or rezoning.

(e) Fences

Any fence of legal height and construction does not constitute a nonconforming use and does not require registration.

(Ord. No. 98697 § 4 & 6)

35-706 Termination of Nonconforming Uses

Termination of nonconforming rights under Subsections (a) and (b) of this section shall provide for notice and hearing as provided in Section 35-406 of this chapter.

(a) By Violation of Chapter

The violation of this chapter shall terminate immediately the right to operate a nonconforming use.

(b) By Specific Acts of Termination

Any one (1) of the following specific acts of termination shall terminate immediately the right to operate a nonconforming use:

(1) Changing a nonconforming use to a conforming use;

(2) Changing a nonconforming use to another nonconforming use as herein provided and authorized; provided, however, that the termination shall apply only to the nonconforming use existing prior to any change;

(3) Nonoperation or nonuse of a nonconforming use for a period of twelve (12) or more successive calendar months;

(4) Vacancy for a period of twelve (12) or more successive calendar months of the structure or that part of a structure occupied by a nonconforming use.

(c) By Action of the Zoning City

The zoning city may inquire into the existence of a nonconforming use, and after public hearing and investigation into the conditions created by the use, fire or health hazards created by the use, and any other danger or nuisance to the public due to or created by any condition or use existing on the property, require the discontinuance of such use. The owner of the use under investigation by the board shall have not less than ten (10) days written notice prior to the day of the public hearing. Time allowed for discontinuance of such use shall be prescribed by the board at a subsequent public hearing, after having heard from the affected parties, based on the board's ruling as to a reasonable amortization period for the nonconforming use. In prescribing said time period, the board shall consider the following factors:

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(1) The owner's capital investment in structures, fixed equipment, and other assets (excluding inventory and other assets that may be feasibly transferred to another site) on the property before the time the use became nonconforming.

(2) Any costs that are directly attributable to the establishment of a compliance date, including demolition expenses, relocation expenses, termination of leases, and discharge of mortgages.

(3) Any return on investment since inception of the use, including net income and depreciation.

(4) The anticipated annual recovery of investment, including net income and depreciation.

Note: For termination of nonconforming structures, see Section 35-707, below.

(d) At the Direction of City Council

The zoning city, at the direction of the city council, shall require the discontinuance of a nonconforming use. The board, after having heard from the affected parties, must provide a reasonable amortization period for the discontinuance of such use based on the factors set forth in subsection (c), above.

(e) By Destruction or Damage of Structure

The right to operate and maintain any nonconforming use, except a single-family dwelling unit, shall terminate and shall cease to exist whenever the structure or structures in which the nonconforming use is operated and maintained is damaged or destroyed from any cause whatsoever, and the cost of repairing such damage or destruction exceeds fifty (50) percent of the replacement cost of such structure on the date of such damage or destruction. A nonconforming single-family dwelling unit which is destroyed or damaged more than fifty (50) percent of the replacement cost may be rebuilt provided a building permit is issued within one (1) year of the date of such damage or destruction. The director of development services may require the submission of necessary evidence to verify the date of damage or destruction.

(f) Applicability to Extraction Facilities

The provisions of this section shall not apply to any tract of real property that is used primarily for the extraction and processing of limestone, sand, gravel, rock, or soil, provided that such use is in compliance with the applicable state and federal permit requirements.

(Ord. No. 98697 § 4)

35-707 Nonconforming Structures

(a) Definition of Nonconforming Structure

A nonconforming structure shall be any existing structure on or after the date of this ordinance which does not comply with all the regulations applicable to the zoning district in which the structure is located.

(b) Continuance of Nonconforming Structures

Subject to all limitations herein set forth, any nonconforming structure may be occupied and operated and maintained in a state of good repair, but no nonconforming structure shall be enlarged or extended.

(c) Enlargement

A nonconforming structure in which only permitted uses are operated may be enlarged or extended if the enlargement or extension can be made in compliance with all of the provisions of this chapter established for structures in the district in which the nonconforming structure is located. Such enlargement shall also be subject to all other applicable city ordinances.

(d) Termination of Nonconforming Structures

(1) Damage to Structures.

The right to operate and maintain any nonconforming structure shall terminate and shall cease to exist whenever the nonconforming structure is damaged in any manner and from any cause whatsoever and the cost of repairing such damage exceeds fifty (50) percent of the replacement cost of such structure on the date of such damage.

(2) Obsolescence of Structure.

The right to operate and maintain any nonconforming structure shall terminate and shall cease to exist whenever the nonconforming structure becomes obsolete or substandard under any applicable ordinance of the municipality and the cost of placing such structure in lawful compliance with the applicable ordinance exceeds fifty (50) percent of the replacement cost of such structure on the date that the proper official of the municipality determines that such structure is obsolete or substandard.

(3) Determination of Replacement Cost.

In determining the replacement cost of any nonconforming structure there shall not be included therein the cost of land or any factors other than the *35-* nonconforming structure itself.

35-708 Sexually Oriented Businesses

Commentary: Type A nonconforming use rights extend to those establishments granted such rights pursuant to the methodology established by Ordinance 82135, passed and approved April 27, 1995, and this ordinance and are subject to §35-706 of this code except for amortization at the direction of city council. Type B nonconforming use rights extend to all other establishments that were lawfully in operation either prior to the adoption of the Sexually Oriented Business Regulations (§ 35-391 of this chapter) or outside of the city's corporate limits; but, as a result of the adoption of the Sexually Oriented Business Regulations (§ 35-391 of this chapter), or annexation after the adoption of the Sexually Oriented Business Regulations (§ 35-391 of this chapter), continued operation of the establishment is unlawful. A conforming use is one that is operating in a lawful manner consistent with the provisions of the Sexually Oriented Business Regulations (§ 35-391 of this chapter).

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(a) Establishment of Nonconforming Use rights for Sexually Oriented Businesses

(1) Type A Nonconforming rights Pre-Dating Protected Use Within One Thousand (1,000) Feet.

Any sexually oriented business legally operating on and after April 2, 1995, which is rendered nonconforming by the subsequent location of a protected use or a protected zone within the protected distance, shall have Type A nonconforming use rights.

(2) Type B rights and Conforming Uses.

A. Each sexually oriented business hereafter subject to the Sexually Oriented Business Regulations (§ 35-391 of this chapter) through annexation must, within ninety (90) days of such annexation, apply for one of two (2) classes of property use rights hereby established, as part of the application for a new certificate of occupancy:

1. Type B nonconforming use rights of one year duration from the date of issue of the certificate of occupancy; or

2. Conforming.

B. The ninety-day time period prescribed within this subsection for the establishment of use rights may be extended, and an application accepted after the expiration of ninety (90) days, if the director of development services determines that the use existed prior to the date of annexation, the sexually oriented business was operating in compliance with all applicable laws, and the failure to timely file the application for one of two (2) classes of property use was not a result of gross negligence or conscious indifference. The director shall render his decision within thirty (30) business days of receipt of the application and shall transmit said determination to the applicant by certified mail, return receipt requested. The applicant may appeal an adverse determination by filing a written notice of appeal with the city clerk within ten (10) days of the date of the decision of the director. The appeal must be filed by the authorized agent of the applicant. The city clerk shall place said appeal on the city council agenda within sixty (60) days from the date notice is received.

C. Type B nonconforming rights shall not be lost by the subsequent establishment of a protected use or protected zone within one thousand (1,000) feet.

(b) Certificates of Occupancy Pursuant to Ord. No. 82135

Any business that holds a certificate of occupancy issued for a sexually oriented business pursuant to the provisions of Ordinance 82135 of April 27, 1995 is not required to

re-apply, and all such certificates of occupancy are hereby confirmed.

(c) Measurements

Measurements to determine if a sexually oriented business is conforming or Type B nonconforming use shall be in the manner prescribed in the Sexually Oriented Business Regulations (§ 35-391 of this chapter).

(d) Amortization of Type B Nonconforming Use rights Beyond One Year

(1) Amortization Hearing Before the Zoning City.

The owner of a sexually oriented business that has been granted Type B nonconforming use rights by the director of development services may request a hearing before the city for a determination of a reasonable amortization period based upon the owner's investment and other generally accepted amortization factors in accordance with the appropriate provisions of § 35-706 of this code.

(2) Time Limit.

The application for the hearing shall be made upon a form provided by the department of development services and must be filed by the owner of the sexually oriented business with the zoning city on or before the date the Type B nonconforming use rights would otherwise expire.

(3) Continuance of Nonconforming rights.

The filing of an amortization request shall continue the Type B nonconforming use rights of a sexually oriented business to the date established by the city, who shall hear and determine the request after affording all interested parties an opportunity to be heard. If the city finds a reasonable amortization period is less than one year, the period of nonconforming use rights may nevertheless continue for a minimum period of one year from the date the Type B nonconforming use certificate of occupancy is issued.

(4) Judicial Review.

A person aggrieved by the finding of the city may petition the district court for review as provided by Texas law.

(Ord. No. 98697 § 4 & 6)

35-709 Expansion of Nonconforming Use by Specific Use

(a) Applicability

No existing use which does not conform to the zoning district of the property affected may be permitted to expand unless a specific use permit has been granted by the city in accordance with the procedures set forth in § 35-423 of this chapter.

(b) Criteria for Specific Use Permit

In addition to the criteria set forth in § 35-423(e) for a specific use permit, the following criteria shall apply to the issuance of a specific use permit for the expansion of a nonconforming use:

(1) The termination of such use will result in unnecessary hardship.

(2) Such continued use will not be contrary to the public interest.

(3) Such continued use will not substantially or permanently injure the appropriate use of adjacent conforming property in the same district.

(4) Such continued use will be in harmony with the spirit and purpose of this chapter.

(5) The plight of the applicant for which the continued use is sought is due to unique circumstances existing on the property and/or within the surrounding district.

(6) The continued use will not substantially weaken the general purposes of this chapter or the regulations established in this chapter for the special district.

(7) The continued use will not adversely affect the public health, safety and welfare.

35-710 Conditions Applicable

Any conditions attached to any rezoning, specific use permit, variance, use permitted by city council review, or any other permit or development order issued under any previously enacted zoning regulations, subdivision, regulations, or Unified Development Code, shall continue to apply to the proposed use and shall be enforceable as provided in Division 11 of Article 4 of this chapter. Such conditions may be waived if an application is approved pursuant to this chapter whereby the applicant agrees to waive and abandon all rights secured under the regulations formerly in effect.

DIVISION 2 VESTED RIGHTS

Commentary: Any project which obtain a “development permit” pursuant to the provisions of Ordinance No. 86715, passed and approved September 25, 1997, shall continue to fall under the purview of said ordinance the adoption of this chapter notwithstanding.

35-711 Common Law, Statutory and Consent Agreement Rights

(a) Applicability

The provisions of this section apply to any application for development approval in which the applicant claims an exemption from any provision of this chapter based on common

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law or statutory vested rights. Neither an expired nor a withdrawn plat application may be relied upon as a permit application for the assertion of vested, development or any other right or claim. If after the expiration or the withdrawal of a plat application the applicant wishes future plat approval of the subject property, a new plat application shall be filed, new application fees shall be required and a new plat number shall be assigned.

(b) Criteria

(1) Common Law Vested Rights.

Common law vested rights shall be acknowledged by the director of development services after consultation with the city attorney if the applicant for common law vested rights does not demonstrate entitlement to statutory vested rights as provided in subsection (2), below. A request for such an acknowledgement must include documents establishing the criteria listed below together with an application review fee in the amount of one hundred forty five dollars ($145.00) to offset the city's costs. The director of development services may request additional relevant material prior to issuing the acknowledgement. The applicant for common law vested rights must show compliance with the following criteria for the specific project to acquire such rights.

A. In reliance upon properly issued permits or approvals the applicant make substantial financial commitments or assumed substantial financial obligations within the purview of the activities authorized by said permit or approval; and

B. The applicant has proceeded in good faith, and no approvals or permits have lapsed or been revoked; and

C. The applicant has established any other factor which may establish vested rights under State or Federal law.

(2) Statutory vested rights.

No vested rights determination claiming entitlement to approval of an application for development approval shall be approved or issued unless the applicant has demonstrated compliance with the following criteria for statutory vested rights, unless the applicant demonstrates entitlement to common law vested rights as provided in subsection (2, above:

A. The applicant used its property or filed an application as provided in Texas Local Government Code § 43.002 prior to annexation, and that the regulations against which vested rights are claimed are not subject to an exemption as provided in Texas Local Government Code § 43.002(c).

B. The applicant filed an application as provided in Texas Local Government Code chapter 245 prior to adoption of the regulations against which vested rights are claimed, that the regulations against which vested rights are claimed are not subject to an exemption as provided in Texas Local Government Code § 245.004 and that the project has not become dormant as defined in Texas Local Government Code § 245.005 and this chapter.

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(c) Consent Agreements

Any applicant for a vested rights determination may apply for consent agreement approval provided that the requirements of subsection (d) of this section are satisfied or the required approval is for one (1) or more, but less than all phases of the proposed development. An application for consent agreement approval may be approved subject to compliance with a consent agreement. An Application for approval of a consent agreement approval may be filed concurrent with an Application for a vested rights determination, or at any time prior to a final decision relating to an Application for a vested rights determination by the city attorney or the city.

(d) Terms and conditions

A consent agreement shall be signed by the city attorney and the applicant and shall include the following terms and conditions:

(1) A legal description of the subject property and the names of the legal and equitable owners;

(2) The duration of the consent agreement and the conditions that will result in revocation;

(3) The uses permitted on the property, including population densities and/or building intensities and height;

(4) A description of the public facilities that will service the proposed development, including who shall provide such facilities; the date any new facilities, if needed, will be constructed; and a schedule to assure that public facilities are available concurrent with the impacts of the development;

(5) A description of any preservation or dedication of land for public purposes;

(6) A description of all development approvals, permits, or other local or State approvals needed for the proposed development;

(7) A finding that the proposed development is consistent with the Master Plan and the relevant provisions of this chapter;

(8) A description of any conditions, terms, restrictions, or other requirements determined to be necessary for the preservation and protection of the public health, safety, or welfare;

(9) A statement indicating that the omission of a limitation or restriction shall not relieve the Applicant of the necessity of complying with all applicable local, state and federal laws;

(10) A phasing plan indicating the anticipated commencement and completion date of all phases of the proposed development; and

(11) A statement that the city attorney shall review progress pursuant to the consent agreement at least once every twelve (12) months to determine if there has been demonstrated good faith compliance with the terms of the consent agreement.

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(e) Failure to Comply With Consent Agreement

If the city finds, on the basis of substantial competent evidence, that there has been a failure to comply with the terms of the consent agreement, the consent agreement may be revoked or modified by the city after a public hearing which has been noticed by publication, and for which notice has been expressly provided to the applicant.

(Ord. No. 98697 § 1)

35-712 Recognition of Vested Rights Derived From Texas Local Government Code Chapter 245

(a) Purpose

This section provides a methodology for the registration of permits, and permit applications, with the department of development services so that a determination can be made as to whether the permit, or permit application is one that would afford a project with the "vested rights" as provided in Chapter 245 and § 43.002 of the Texas Local Government Code. The purpose for such registration and determination is to assist city staff in their review of the applicability of Chapter 245 or § 43.002 to a particular project. This section shall not apply to a claim of right under common law, a federal or state statute, other than Chapter 245 or § 43.002, or the state or federal constitutions. Any claim of right made under some law or authority, other than Chapter 245 or § 43.002, should be made to the director of development services in writing. The director of development services shall advise the city attorney of the claim who shall make a determination of the validity of the claim within 20 days of its receipt by the city. Additionally, as provided in Subsection (g) of this section, this section shall not apply to the types of ordinances, or other governmental action, enumerated in VTCA Local Government Code § 245.004 or exempt from § 43.002.

(b) Vested Rights Recognition Process

(1) Initiation.

An application may be made to the director of development services for recognition of vested rights for a particular project by completion of a form provided by the development services department that indicates which permit or permits are being relied on by the applicant for establishment of vested rights. The applicant for vested rights recognition shall provide the department of development services with a completed application together with a permit application review fee in the amount of one hundred forty-five dollars ($145.00) and two (2) copies of any documents on which the applicant is relying to establish vested rights.

(2) Review and Approval.

After receiving an application for vested rights recognition, the department of development services shall review the application and approve, deny or request additional information to be provided for consideration of the application within twenty (20) working days. Should the permit, which is the basis for vested rights recognition, have been issued by a governmental agency other than the city the department of development services shall request the office of the city attorney to determine whether the permit establishes rights under Chapter 245. In the event

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the department development services does not respond to an application for vested rights within twenty (20) working days, the application will be considered denied. Provided, however, the time period may be extended upon the written request of the applicant. Upon review of the application, if the department development services finds that the applicant has provided sufficient information to establish that one (1) or more permit(s) exists on a project, they shall issue a certificate to the applicant recognizing vested rights for the project. The certificate recognizing vested rights shall be dated and signed by the individual reviewing the application. The director of development services shall also review all certificates prior to issuance. The certificate shall also clearly indicate the term and conditions (indicated above) required for the continuance of the vested rights being recognized. In the event the department development services requests additional information for consideration of an application, the applicant shall be notified in writing within the required time period of specifically what information must be submitted in order to complete the review of the application. Should application be denied the department development services shall enumerate in writing any and all reasons for such denial, which shall be delivered to the applicant within the time period allowed for review.

(3) Basis for Permit Rights

The following criteria will be used by the city in determining the existence of rights for projects initiated after September 1, 1997. The following permits may be relied on by a property owner or developer to establish permit rights for property that is the subject of the permit. Provided, however, a minor plat that plats only easements shall not confer any permit rights. The permit rights acquired in reliance on (1) of the types of permits indicated below will expire unless the action required to maintain permit rights is taken within the time frame indicated for each permit type.

A. Preliminary overall area development plan (POADP)

Permit rights will be recognized on the property which is the subject of a POADP that has been approved by the city planning department. The permit rights recognized for property located with an approved POADP will expire unless a final plat is approved within eighteen (18) months from the approval of the POADP that plats, at least eight (8) percent of the net area of the POADP area or that requires at least five hundred thousand dollars ($500,000.00) in infrastructure expenses if the POADP is one thousand (1,000) acres or less or at least one million dollars ($1,000,000.00) if the POADP is more than one thousand (1,000) acres.

Further, the permit rights for property within an approved POADP will expire unless fifty (50) percent of the net area with the approved POADP is the subject of final plats or development within ten (10) years from the date of approval of the POADP. The remaining fifty (50) percent must obtain final plat approval or be developed within ten (10) years after the initial fifty (50) percent of the net area within the POADP has been platted or developed Unless specific provisions to the contrary exist in an individual ordinance or city code provision, the filing of an amending POADP, plat or replat will not result in a loss of permit rights provided that the required area of acreage within the POADP platted or value of

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infrastructure expenses do not fall below the amounts indicated above as a result of the amendment or replat.

B. Plat Applications

Permit rights will be recognized on the property that is the subject of a plat application that has been filed with the city planning department, provided all necessary platting fees have been paid. The rights recognized for property located within such a plat application will expire unless the plat application is heard by and approved by the director of planning or the planning commission within eighteen (18) months from the date the plat application is filed with the city planning department.

C. Plats

Permit rights will be recognized on the property which is the subject of a plat that has been approved by the city planning commission or director of planning. The permit rights recognized for property located within an approved plat will expire unless the plat is recorded tin the Bexar County Deed Records within three (3) years from the date of approval by the city planning commission or director of planning.

D. Building Permits

A building permit may be relied on as a basis for permit rights for property identified in the site plan submitted to the city as part of the building permit application. However, rights that are base on a building permit will expire unless construction authorized by the building permit is begun within sic (6) months from the date the building permit is issued.

E. Permit Rights Conferred

Permits rights conferred by this section shall not extend beyond the time periods prescribed herein except by the granting of a variance from the time limits as provided herein. Under no circumstances shall the extension of a time limit extend the permit rights conferred herein except through the variance provision of this section.

(c) Recordation

The department development services shall create a file of all certificates issued pursuant to this provision that will be available to the public during regular business hours. At a minimum the file should contain all certificates issued for a three calendar year period and should be reviewed annually to remove certificates more than three (3) years old. Certificates more than three (3) years old shall be made available in conformance with the Public Information Act.

(d) Vested Rights Recognition Process Appeal

In the event an applicant for recognition of vested rights is aggrieved by an action taken regarding the recognition of those rights or the application of the above requirements, the applicant may appeal the decision of the department development services staff to the planning commission by filing a request for appeal with the director of development

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services within fifteen (15) calendar days from the date the applicant is notified of the adverse decision or action taken under these requirements. The application for appeal shall be made in writing and shall contain the applicant's rationale for requesting the appeal. The director of development services shall place the appeal on the agenda of the planning commission and the planning commission shall hold a hearing on the appeal and make its ruling within forty-five (45) days from the date the request for appeal was filed. If the planning commission denies all or part of the relief requested in the appeal, the applicant may make a final appeal to the city council by filing a notice of final appeal in writing together with payment of seventy-five dollars ($75.00) to offset the city's costs with the office of the city clerk no later than the tenth (10) day following the party's receipt of the written decision of the planning commission from which the final appeal is brought. The city clerk shall schedule the hearing of the final appeal at the earliest regularly scheduled meeting of the city council that will allow compliance with the requirements of the Texas Open Meetings Act. The decision of the city council shall be final.

(e) Variance

An individual, or business entity, that has vested rights may request a variance from the time limit, required action, or term, that would otherwise cause the vested rights to expire. An individual requesting a variance must make written application to the director of development services and pay a variance application fee in the amount of one hundred forty five dollars ($145.00). The request for variance must identify the specific provisions for which a variance is being requested and the reasons the applicant feels justify the granting of the variance. The director of development services shall review the application for variance and provide a written recommendation with regard to whether the variance should be granted, conditionally granted or denied to the planning commission within thirty (30) days from the date the application or variance is filed. In the event the planning commission fails to make a ruling on the variance within sixty (60) days from the date the application for variance is filed, the application for variance shall be deemed denied. Provided, however, the time period may be extended upon the written request of the applicant. In order to grant a variance from the provisions of this section, the planning commission must find, that:

(1) The applicant would suffer a hardship in the absence of a variance that is not the result of the applicant's own negligence; and

(2) The applicant has been actively attempting to pursue and complete development of the project that is the subject of the vested rights; and

(3) Compliance with rules and regulations passed after the recognition of vested rights would cause a substantial economic hardship to the developer/property owner that would preclude the capability of completing the project in a reasonable and prudent manner.

(f) Variance Appeal

If the planning commission denies all or part of the relief requested in a request for variance, the applicant may make an appeal to the city council by filing a notice of appeal in writing together with a payment of seventy five dollars ($75.00) to offset the city's costs with the office of the city clerk for the city no later than the tenth (10) day following the party's receipt of the written decision of the planning commission from which the final appeal is brought. The city clerk shall schedule the hearing of the appeal at the earliest

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regularly scheduled meeting of the city council which will allow compliance with the requirements of the Texas Open Meetings Act. The decision of the city council shall be final.

(g) Exemption From Vested Rights

The types of ordinances enumerated in VTCA Local Government Code § 245.004 are exempt from this section and will apply to a project or development regardless of the effective date of the ordinance or the existence of vested rights for the project.

(1) Future ordinances: Any ordinance that: concerns the development of real property and is adopted after the adoption of this chapter, which incorporates this section into the city code of ordinances, may specifically state whether it is the type of ordinance that is exempted by § 245.004. However, the absence of such a statement shall not be determinative as to whether the ordinance is or is not exempted.

(2) Existing ordinances: This section shall not be applicable to any ordinance that: concerns the development of real property; as adopted prior to the adoption of this chapter and is exempted by § 245.004 from the protection provided by Chapter 245.

(3) Determination by city attorney: Should a question arise as to whether an ordinance is exempted from Chapter 245 the director of development services shall request an opinion from the office of the city attorney.

(h) Duration

This section shall not extend the time of validity for any permit. Any rights recognized by the application of this section shall not extend beyond the time periods prescribed for the validity or the permit or permits that were submitted for recognition except by the granting of a variance from the time limit as provided herein.

(i) Voluntary Compliance

Nothing herein would prohibit the voluntary compliance with any future ordinance, regulation or incentive.

(j) Previously issued Certificates

Nothing herein shall affect the validity of any vested right which was recognized pursuant to Ordinance No. 86715, passed and approved September 25, 1997.

(k) Chapter 245 of Texas Local Government Code Adopted

Chapter 245 of the Texas Local Government Code, as adopted in 1999 by the 76th Legislature, regular session hereby adopted and incorporated by reference herein. Should Chapter 245 be repealed by the Legislature it shall remain effective as part of this code for one year from the date of such repeal. During said period city council shall take

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action it deems necessary to provide municipal protection for ongoing projects from the affects of unanticipated subsequent regulations.

(Ord. No. 98697 § 1 & 6)

35-713 Dormant Projects

(a) Purpose

The purpose of this section is to provide an expiration date for permits approved prior to this chapter which lack an expiration date, as provided in Texas Local Government Code § 245.005.

(b) Applicability

The provisions of this section apply to any permit if as of the first anniversary of the effective date of chapter 245 of the Texas Local Government Code: (i) the permit does not have an expiration date; and (ii) no progress has been made towards completion of the project, as defined in Texas Local Government Code § 245.005.

Commentary: Texas Local Government Code § 245.005 defines "progress towards completion" as any of the following: (1) an application for a final plat or plan is submitted to a regulatory agency; (2) a good-faith attempt is made to file with a regulatory agency an application for a permit necessary to begin or continue towards completion of the project; (3) costs have been incurred for developing the project including, without limitation, costs associated with roadway, utility, and other infrastructure facilities designed to serve, in whole or in part, the project (but exclusive of land acquisition) in the aggregate amount of five percent of the most recent appraised market value of the real property on which the project is located; (4) fiscal security is posted with a regulatory agency to ensure performance of an obligation required by the regulatory agency; or (5) utility connection fees or impact fees for the project have been paid to a regulatory agency.

(c) Expiration of Dormant Projects

A dormant project, as defined in subsection (b), above, shall expire on one of the following dates, whichever comes later:

(1) May 11, 2004 (the fifth anniversary of the effective date of Chapter 245 of the Local Government Code); or

(2) The expiration date established by applying the subsection entitled "scope of approval" in the regulations pertaining to the permit as established in Article 4; or

(3) The expiration date for a permit subject to § 35-711 of this article for any eligible permit as set forth in § 35-711(a).

35.714 to 35-719 Reserved

DIVISION 3 TRANSITIONAL PROVISIONS

35-720 Existing Special Use Permits

Note: prior to the adoption of this section, the procedure used in this section was referred to as a "special use permit."

Special use permits granted prior to the effective date of Ordinance No. 91202 shall remain in place and shall be subject only to the conditions and criteria in place at the time that they were originally granted. Special use permits granted prior to the effective date of this chapter may not be extended or modified. Extension or modification of an existing special use permit shall require consideration as a new special use permit.

35-721 Impact Fees

(a) Protection of Prior Rights.

This section protects prior rights established for certain properties which have been platted or replatted and recorded prior to the effective date of this article. Such protection of prior rights in the form of an exemption from the requirement to pay an impact fee is applicable to properties which, prior to the effective date of this article, met all the following criteria:

(1) The property had been platted/replatted and recorded in accordance with Chapter 212 of the Local Government Code.

(2) The property had met all city code requirements applicable to sewer service in effect at the time sewer service was granted to the property.

(3) The property had paid all sewer fees and/or impact fees in effect at the time sewer service was granted to the property.

(4) If applicable, a sewer service contract had been executed covering such property.

(b) Properties Replatted After Effective Date of This Chapter

This section protects prior rights established for certain properties which are to be replatted after the effective date of this article. Such protection of prior rights in the form of an exemption from the requirement to pay an impact fee is limited to the EDU equivalent of the amount of gallons of flow or the number of EDUs set out in the Board's application for sewer service, or an amount not to exceed five (5) EDUs per acre, whichever is greater. Should the Board's application for sewer service reflect an EDU amount less than five (5) EDUs per acre, the exemption shall equal the lesser amount. This exemption is applicable to properties which, prior to the effective date of this article, met all the following criteria:

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(1) The property had been platted/replatted and recorded in accordance with Chapter 212 of the Local Government Code.

(2) The property had met all city code requirements applicable to sewer service in effect at the time sewer service was granted to the property.

(3) The property had paid all sewer fees and/or impact fees in effect at the time sewer service was granted to the property.

(4) If applicable, a sewer service contract had been executed covering such property.

If, after the effective date of this article, properties meeting such exemption requirements are replatted, resulting in the generation of flows in excess of the amount of EDUs for which an exemption was granted, such properties shall only be required to pay an impact fee amount equal to the number of EDUs generated in excess of the number of EDUs exempted.

(c) Properties Located Within the Lackland City Water Company Medio Creek Plant

This section protects prior rights established for certain properties located within the Lackland City Water Company Medio Creek Plant permitted area for sewer service and for which sewer service collection and/or treatment from Lackland City Water Company had been formally committed prior to December 3, 1991. Such protection of prior rights in the form of an exemption from the requirement to pay an impact fee is applicable to properties which prior to December 3, 1991 met all the following criteria:

(1) The property was located within the area covered by the Lackland City Water Company Certificate of Convenience and Necessity (CCN) No. 20274 issued by the Texas Water Commission and Texas Water Commission Permit No. 10827-03.

(2) The property was covered by a contract with the Lackland City Water Company which was subsequently assumed in part by the city of San Antonio pursuant to an asset purchase agreement between the city of San Antonio and the Lackland City Water Company.

(3) The property was designated to receive a certain amount of committed capacity in an off-site line pursuant to an assumed Lackland contract and such off-site line was constructed, completed and accepted (necessary for exemption to collection fee component) and/or was designated to receive a certain amount of committed treatment capacity from Lackland through the purchase of treatment certificates (necessary for exemption to treatment fee component). In order to receive an exemption the developer must provide the appropriate documentation indicating that he owns both the property and the accompanying capacity described in the contracts and certificates which are the subject of this section.

The board shall determine and keep records of properties eligible for an exemption under this section. The board's records shall reflect the amount of collection and/or treatment capacity committed to a property for which an impact fee is not required. Such exemptions may be utilized at the time of platting/replatting of the property. In the event

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the developer of such property may disagree with the records of the board, he may both examine the records of the board pursuant to the open records act and supply additional information to the CEO/president or his designated representative to show evidence that an exemption for additional capacity should be granted. In the event the CEO/president or his designated representative does not find such evidence sufficient to grant an additional exemption, the developer shall follow the variance procedures set forth herein.

Commentary: The purpose of this subsection c is to protect prior rights granted by the Lackland City Water Company and subsequently assumed by the board. The city of San Antonio entered into an asset purchase agreement with the Lackland City Water Company pursuant to Ordinance 74492 dated October 3, 1991. Such purchase was completed December 3, 1991. The city, and subsequently the board assumed certain obligations to provide sewer service under the following contracts:

- *Contract for construction and conveyance of water and sanitary sewer facilities and for providing water and sewage service between Lackland City Water Company and J. H. Uptmore and Associates Inc. dated May 8, 1981.*

- *Contract for construction and dedication of sanitary sewer facilities and for providing sewage services between Lackland City Water Company and Southwest Ranch, Ltd dated July 19, 1983 contract to provide wastewater treatment service between Lackland City Water Company and Westcreek Utility Company, Inc. dated August 24, 1984.*

- *Contract for construction and conveyance of sanitary sewer facilities and providing sewage services between Lackland City Water Company and Homecraft Land Development Inc. and Oak Creek Environmental Management Inc., as developer dated August 8, 1985.*

- *Wastewater Utility Service Contract between Lackland City Water Company and United States of America Lackland Air Force Base Training Annex dated August 1, 1988, as amended.*

Former Section 35-4262 of this code which provided for the extension of sewer mains to single family residential lots platted prior to July 6, 1970, is not altered by this article.

(d) Vested Rights

(1) Creation.

Vested rights to sanitary sewer treatment and/or collection capacity shall be granted by the board for developments which have met the requirements either under the provisions of this article or under the regulations which were in effect prior to the effective date of this article. Once the board accepts an impact fee, a vested right in sanitary sewer facilities is created for the purchasing developer and that vested right becomes an appurtenance to the property being served.

(2) Minimum Capacity.

Vested rights for up to four (4) equivalent dwelling units (EDUs) per net acre may only be transferred or assigned as part of a real estate transaction in which the property being served is itself transferred. Vested rights as represented by sewer

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capacity in excess of four (4) EDUs per net acre may be either transferred or assigned as part of a real estate transaction in which the property being served is itself transferred, or, with the approval of the city council, assigned for use by another property.

(3) Fee Payment.

While vested rights to either treatment or collection capacity will be recognized under the conditions set forth herein, the developer must pay (either in the form of cash or credits) the fully assessed impact fee, or sewer platting fee levied prior to the effective date of this article, before the Board shall allow wastewater flows from the on-site system of a development to be discharged into the off-site sewer system.

(4) Board Recognition.

The board recognizes vested sewer rights as follows:

A. Collection System Capacity

A developer has a vested right to the sanitary sewer collection system capacity in an off-site sewer line serving his development if the developer has paid the collection component of the sewer platting fee or impact fee, or its equivalent, either in the form of a direct payment to the Board or by earning impact fee credits; by having paid for the equivalent of the estimated construction cost of the off-site sanitary sewer capacity at a cost which at least equals the collection fee component he otherwise would have paid at the time of plat approval; or by having paid an acreage fee.

B. Treatment System Capacity

A developer has a vested right to the sanitary sewer treatment system capacity at a wastewater treatment plant serving his development if the developer has paid the treatment component of the sewer platting fee or impact fee, or its equivalent, either in the form of a direct payment to the board or by earning impact fee credits; or by having paid for the equivalent of the estimated construction cost of treatment facilities at a cost which at least equals the treatment component he otherwise would have paid at the time such payment is required under this article.

(5) Flows From Other Developments.

The board reserves the right to connect wastewater flows from other developments to on-site and/or off-site sanitary sewer systems which serve existing developments, regardless of whether such systems were oversized to accommodate the additional wastewater flows. However, in order to preserve the vested rights of the existing development, the board commits to the following:

A. The board shall maintain records regarding a developer's vested rights in sanitary sewer systems. In the event the developer would exceed those rights as a result of any subsequent platting or replatting of property, the board shall have the right to refuse to accept the excessive flows into the

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board's sanitary sewer system or to assess the developer the appropriate additional impact fee.

B. The board retains exclusive ownership of the capacity in all sanitary sewer facilities under its control. The board shall, however, continue to serve a development for which impact fees or platting fees have been paid by recognizing the vested rights of the developer. The developer shall not be denied service solely on the basis that the remaining sanitary sewer capacity for a given development is insufficient to accommodate the flows of anticipated development when such insufficiency is the result of the board connecting other development generated flows to the sanitary sewer system serving the developer's property.

C. The board acknowledges its obligation to guarantee a developer's vested right to on-site and/or off-site sanitary sewer capacity serving his property in order that the developer may achieve reasonable, timely, and complete platted development of his property.

(6) Use of Another's Vested Right.

When a subsequent developer wishes to utilize sanitary sewer capacity which has already been recognized as a vested right in accordance with this article, the Board may permit the developer to utilize that capacity only if the developer meets all of the conditions listed below. The subsequent developer shall enter into a reserve capacity agreement with the board agreeing that the board shall reserve capacity in a future capital improvements project, with the added provision that the capital improvement would serve his development at such time as the board determines sanitary sewer demand in the service area warrants the construction of additional treatment and/or collection capacity. The subsequent developer shall further agree not to require the board to construct the additional treatment and/or collection capacity in accordance with the timing requirements specified in V.T.C.A., Local Government Code Chapter 395. Prior to the execution of the agreement by the board, the subsequent developer shall pay the required collection and/or treatment component of the impact fee in accordance with the rate schedule in Appendix “C”.

(7) Transferability.

Vested rights, once established in accordance with this subsection (d), are not transferable but may be assigned subject to the limitations set out in subsection (d)(2), above.

(Ord. No. 98697 § 6)

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